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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GIOVANNI JON CEDILLO, Defendant and Appellant.	E061699 (Super.Ct.No. FWV1400840) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Scott C. Taylor, A. Natasha Cortina and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Giovanni Jon Cedillo made a pass at a neighbor's girlfriend. After her boyfriend remonstrated with him about this, defendant pulled up his shirt, revealing the handle of a gun, and threatened to make the boyfriend "leak blood."

A jury found defendant guilty of making a criminal threat. (Pen. Code, § 422.) He was sentenced to two years in prison, along with the usual fines, fees, and restrictions.

Defendant now contends:

1. The trial court erred by refusing to instruct on self-defense.

2. There was insufficient evidence to support the conviction for making a criminal threat.

3. The trial court erred by failing to instruct on attempt to make a criminal threat as a lesser included offense.

We find no prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

Defendant lived in an apartment complex in Rancho Cucamonga. Christopher Serrato[1] and Shawna Buck lived in an apartment facing defendant's. Serrato and Buck

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[1] In the reporter's transcript, the victim is referred to as John Doe. The trial court, however never actually ordered that he be referred to by this fictitious name.

It is not at all clear that a trial court can order the use of a fictitious name in a case that does not involve a sex offense. (See *People v. Ramirez* (1997) 55 Cal.App.4th 47, 53.) And even in a sex offense case, a victim is not supposed to be referred to by a fictitious name unless the trial court finds that a fictitious name "is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the

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were not married, but they had a five-year-old child together and they regarded each other as husband and wife. When they saw defendant, they would nod and say "Hi," but they did not really speak to him.

On March 7, 2014, sometime after 10:00 p.m., defendant knocked on their door. Serrato was out at a restaurant, celebrating a family birthday. Buck's mother was there, visiting her. After some brief small talk, defendant told Buck that she looked sexy. He added that her husband did not know what he had. He asked "if [she was] unavailable if [she] had [a] sister for him."

Buck said, "I'm going back inside," and did so. Defendant knocked again, but she ignored him. He "started barking like a dog." Buck's mother opened the door and told defendant to stop and to leave. Defendant argued with Buck's mother for awhile but then went into his apartment.

Buck phoned Serrato, told him what had happened, and asked him to come home. He arrived 15 or 20 minutes later and went to talk to defendant. Serrato was six foot

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defense." (Pen. Code, § 293.5, subd. (a).) Here, the trial court never made any such finding. As far as the record shows, there was no reason to protect the victim's privacy any more than any victim's in any criminal case.

Defendant has never objected to calling the victim John Doe. However, his is not the only interest at stake; there is also a public interest in access to judicial proceedings. (See generally *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.) Hence, we use the victim's true name.

three and weighed about 250 pounds. Defendant was five foot six or seven and weighed about 180 pounds.

Serrato told defendant to stay away from his wife and family. He was "calm." He was trying to be "polite and non-threatening," though he "probably" used "a stern voice," so defendant would "get the hint." He admitted using "the F-word." He summarized his side of the conversation as: "[E]xpletive, leave my family alone, that's it and drop this, have a good night." He confirmed that he did specifically use the words, "[L]et's drop this." In response, defendant just kept saying, "God bless," over and over. This interaction lasted 10 or 15 minutes.

Finally, Serrato turned around and started walking back to his apartment. Defendant then said, "Do you want to leak?" Serrato did not understand what this meant; he turned back around and asked, "What did you say?" Defendant lifted up his tank top, exposing the handle of a gun in his waistband, and threatened to make Serrato "leak blood."

Serrato continued to talk to defendant for three to five minutes. Nevertheless, he was "in fear" and "panicking." It was "fair to say" that he was "frozen in fear." He had "mixed emotions between angry and kind of nervous."

Meanwhile, on overhearing defendant's threat, Buck had called the police. She then "pulled" Serrato back to their apartment. He went with her because he realized that he "had too much to lose for something so small and stupid." When the police interviewed Serrato, he seemed to be in fear — he was "flustered" and "distraught."

When the police knocked on defendant's door, he turned off the lights and did not open the door. Instead, he tried to climb out of his rear window, but an officer yelled at him, and he went back inside. The police entered and arrested him. They found a pellet gun on his bed.

In an interview, defendant denied owning or having any weapons. When the police told him that they had found the pellet gun, however, he admitted that it was his. He also admitted telling Serrato that he was going to "make him leak, make him bleed." Finally, he admitted that the pellet gun was in his waistband when he said this.

A police officer testified that, after Serrato identified defendant in a field lineup, defendant blurted out, "I'm going to put him on his back and make him bleed." However, the officer's report had not mentioned this.

II

REFUSAL TO INSTRUCT ON SELF-DEFENSE

Defense counsel requested an instruction on self-defense. The trial court found insufficient evidence of self-defense, and it therefore denied the request. Defendant contends that this was error.

For self-defense to apply, "one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.]" (*People v. Randle* (2005) 35 Cal.4th 987, 994, disapproved on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

We may assume, without deciding, the self-defense can be a defense to a charge of making a criminal threat. (See Cal. Const., art. I, § 1; Pen. Code, §§ 692, 693; *People v. McDonnell* (1917) 32 Cal.App. 694, 704; but see *People v. Saavedra* (2007) 156 Cal.App.4th 561, 571 [self-defense is not a defense to possession of an enumerated weapon in a penal institution].)

"A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. [Citation.]" (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.)

Here, there was uncontradicted evidence that Serrato was calm. The worst that can be said is that he used a "stern" voice and used "the F-word." The use of profanity alone — even during an argument — does not justify self-defense, because a reasonable person would not conclude that a violent attack is imminent. (This is particularly true in light of the increasing prevalence of the F-word in modern conversation.)

Defendant argues that Serrato stayed at his door, confronting him, for an estimated 10 or 15 minutes. Even if so, it is not reasonably inferable that Serrato did anything to indicate that he was about to attack defendant. Quite the contrary — as Serrato did not attack defendant in the first 14 minutes, there was no apparent reason to think he would do so in the 15th.

Most important, there was also uncontradicted evidence that Serrato had already said "[L]et's drop this" and "[H]ave a good night." He had turned around and started walking back to his apartment. Defendant's first threat was spoken to his back. Under these circumstances, defendant could not *reasonably* believe that he was in *imminent* danger.

Defendant claims that Serrato's testimony about exactly when he started walking back to his apartment was inconsistent. This claim focuses on a single question and answer:

"Q. . . . He makes the comment to you, brandishes the gun, shows it to you, makes the comment, do you want to leak, what do you do next?

"A. Start walking back to my house my wife calls the cops."

This is not inconsistent because, according to Serrato, he started walking back to his apartment twice — once right *before* defendant made the threat, and again about three minutes after defendant made the threat. Because the question asked what he did "next," i.e., *after* defendant made the threat, Serrato appears to be referring to the second time that he walked back to his apartment. In any event, any even arguable inconsistency was so minor that defense counsel did not call attention to it in cross-examination or in closing argument.

Defendant also claims that Buck "did not corroborate" Serrato's testimony that he was already walking back. However, she was never specifically asked about this one way or the other. She testified that she "heard" defendant make the threat; she never testified

that she could see either defendant or Serrato at this particular point. Somewhat to the contrary, she testified that she went inside her apartment and stood "away from the door" because she "d[id]n't want to see [defendant]." It would be sheer speculation to conclude, from her mere failure to testify that she saw Serrato turn, that Serrato was affirmatively menacing defendant.

Defendant argues that the jury did not have to believe Serrato's account. We concur. However, "'"[d]isbelief [of a witness' testimony] does not create affirmative evidence to the contrary of that which is discarded."' [Citation.]" (*People v. Loewen* (1983) 35 Cal.3d 117, 125.) Suppose we ignore the uncontradicted evidence that points away from self-defense, such as that Serrato said, "[L]et's drop this" and turned around. The remaining evidence — that Serrato was bigger than defendant, that he was angry, that he used profanity, and that the confrontation lasted 10 or 15 minutes — show, at most, that the interaction was hostile; they do not show that Serrato did anything that would lead a reasonable person to believe that he was in imminent danger of great bodily injury or death. "'Speculation is not substantial evidence.' [Citation.]" (*People v. McCloud* (2012) 211 Cal.App.4th 788, 807.)

We recognize that a defendant can assert self-defense even if he or she does not testify. Here, however, there was some evidence of defendant's own statements and actions, and this evidence was inconsistent with any claim of self-defense. When the police arrived, he showed consciousness of guilt by turning off his lights and trying to

escape through his rear window. When the police interviewed him, he did not claim self-defense. Instead, he lied and told them that he did not own a weapon.

We therefore conclude that there was insufficient evidence to require an instruction on self-defense.

III

EVIDENCE OF A THREAT THAT WAS LIKELY TO CAUSE AND ACTUALLY DID CAUSE REASONABLE, SUSTAINED FEAR

A. *The Sufficiency of the Evidence*.

Defendant contends that there was insufficient evidence to support his conviction for making a criminal threat.

"In order to prove a violation of [Penal Code] section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was

'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant argues that there was insufficient evidence of the third element (which, boiled down, is that the threat was likely to cause reasonable, sustained fear), the fourth element (that the threat actually caused sustained fear), and the fifth element (that the threat actually caused reasonable fear).

First, defendant claims that he merely asked Serrato a question — "Do you want to leak blood?" However, there was also evidence that defendant made a threat that was *not* a question. Serrato and Buck both testified that he made a threat more than once. Buck testified, "He said he was going to make my husband leak." Serrato testified that defendant said, "I'm going to make you leak."

Whether the threat was in the form of a question or a statement, however, is really beside the point. "[T]he reference to an 'unconditional' threat in [Penal Code] section 422 is not absolute." (*People v. Bolin* (1998) 18 Cal.4th 297, 339.) "[T]he threat must be '*so . . .* unconditional *. . . as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution . . . .*' [Citation.] 'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.] 'If the fact that a threat is conditioned on something occurring renders it not a true threat, there would have been no need to include in the statement the word "so."' [Citation.]

This provision 'implies that there are different degrees of unconditionality. A threat which may appear conditional on its face can be unconditional under the circumstances . . . . [¶] Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. A seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution.' [Citation.]" (*Id.* at pp. 339-340.) Here, at the same time as defendant made the threat, he displayed what appeared to be a real gun. Under the circumstances, this conveyed an immediate threat to shoot.[2]

Second, defendant argues that he was "initially conciliatory toward [Serrato] and only posed this question in a last-ditch attempt to get [Serrato] to leave . . . ." Of course, as already discussed (see part II, *ante*), the evidence showed that Serrato was already leaving. More important, however, we fail to see how this argument helps defendant. It still means that defendant deliberately escalated the situation. Indeed, the only way the "question" would get Serrato to leave is if he took it as a threat.

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[2] Arguably, defendant's display of the gun was a threat in itself. However, the question of whether a nonverbal threat can be the basis of a conviction under Penal Code section 422 is presently before the California Supreme Court in *People v. Gonzalez*, review granted March 18, 2015, S223763. Accordingly, to be on the safe side, we treat defendant's statements as the relevant threat, although they must be viewed in light of the totality of the circumstances, including his display of the gun.

Third, defendant argues that Serrato did not leave immediately after the threat. Serrato testified, however, that he was, in fact, afraid. He explained that he was angry as well as fearful. At first, anger prevailed; however, when Buck pulled him away, he realized that he "had too much to lose." Moreover, when the police interviewed Serrato, he still appeared to be in fear. "Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) It was not physically impossible or inherently improbable that he might stand up to defendant, despite his fear. Indeed, in closing argument, defense counsel conceded that "it is reasonable to conclude [Serrato] was scared."

Fourth, defendant argues that he and Serrato had always gotten along well enough before. Suddenly, however, defendant had started acting strangely — hitting on Buck, barking like a dog, and saying nothing but "God bless." In any event, even if defendant and Serrato had been best buddies, having an argument with one's best buddy over him hitting on your wife, during which he displays a gun and threatens to make you "leak blood," would reasonably place one in fear.

We therefore conclude that there was sufficient evidence that defendant's threat was so unequivocal, unconditional, immediate, and specific as to convey gravity of purpose and an immediate prospect of execution. We further conclude that there was sufficient evidence that it did actually place Serrato in both reasonable and sustained fear.

B. *The Need for an Instruction on the Lesser Included Offense of Attempt to Make a Criminal Threat*.

As a fallback argument, defendant also contends that, even if there was sufficient evidence of making a criminal threat, there was *also* sufficient evidence that one or more elements of the offense was *lacking*; thus, the trial court erred by failing to instruct on the lesser included offense of attempt to make a criminal threat.

"A trial court must instruct on all lesser included offenses supported by substantial evidence. [Citations.] The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. [Citations.]" (*People v. Duff* (2014) 58 Cal.4th 527, 561.)

We may assume, without deciding, that attempt to make a criminal threat is a lesser included offense of making a criminal threat. (See *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607-611 ["California appellate courts have repeatedly accepted the principle that attempt is a lesser included offense of any completed crime"]; but see *People v. Bailey* (2012) 54 Cal.4th 740, 747-754 [attempted escape is not a lesser included offense of escape]; *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1247-1251 [attempted rape of an intoxicated person is not a lesser included offense of rape of an intoxicated person].)[3] Serrato's failure to leave immediately was some evidence that he

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[3] The People concede that attempt to make a criminal threat is a lesser included offense of making a criminal threat, citing *People v. Toledo*, *supra*, 26 Cal.4th 221. *Toledo*, however, merely held that there is such an offense as attempt to make a

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was not in fear, and thus that defendant did not commit the completed offense. Under our assumption, then, the trial court erred by failing to instruct on attempt to make a criminal threat.

Even if so, however, the error was harmless. "'The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818 . . . . Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1267.) "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

The circumstances here — defendant displaying a gun and threatening to make Serrato "leak blood," after Serrato had just told him to stay away from his wife and family — would place the ordinary, reasonable person in fear. This is true even if the threat was made in the form of a question. While the jury theoretically could have found, from the fact that Serrato did not leave immediately, that he was not afraid, it was highly unlikely

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criminal threat. (*Id*. at pp. 227-235.) It did not speak to the lesser included offense question.

to do so. As already discussed, Serrato affirmatively testified that he was afraid; moreover, this was only natural. He still appeared to be afraid even after police officers arrived. Thus, we see no reasonable likelihood that, even if the trial court had instructed on attempt to make a criminal threat, the jury would have found defendant guilty only of this offense. (Cf. *People v. Thomas* (2012) 53 Cal.4th 771, 815 ["Based on the evidence presented, the jury was not reasonably likely to have convicted defendant of the lesser offense if instructions on [the lesser offense] had been given."].)

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.